United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7181

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FOLEY SQUARE
NEW YORK, NEW YORK 10007

#76-7181
C/A Index No.

IN THE MATTER OF THE APPEAL OF,

Albert E. McFerran Jr. PRO SE(131 Clermont St., Albany, N.Y.12203)
Tenured Teacher, Enlarged City
School District of Troy, New York — appellant

-against-

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The Board of Education, Enlarged City
School District of Troy, New York
1950 Burdett Avenue
Troy, New York — respondent
attorney: George Lettko
5 First Street
Troy, New York 12180

-and-

The Commissioner of Education
State of New York
University of the State of New York
Washington Avenue
Albany, New York — respondent
attorney: Robert Stone
Counsel to the Commissioner

The herein BRIEF of said appellant, Albert E. McFerran Jr. is submitted to the U.S. Court of Appeals, Foley Square, New York, New York 10007 in Appeal from the MEMORANDUM-DECISION AND ORDER OF Chief Judge James T. Foley, United States District Court, Northern District of New York, Post Office and Federal Court House, Albany, New York.

The Decision appealed from is numbered 75-CV-265, said Memorandum-Decision and Order rendered on February 26, 1976.

TABLE OF CONTENTS

TABLE OF CASES CITED IN THIS BRIEF

Decisions of the NYS Commissioner of Ed.

(Sequence to dates of issuance to be related to CD 8608 from first three, and then matter in its entirety to School District v. Nyquist issued in November 1975--all cases on longevity payments.)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FOLEY SQUARE
NEW YORK, N.Y. 10007

IN THE MATTER OF:

ALBERT E. MCFERRAN JR. PRO SE
Tenured Teacher, Enlarged City
School District of Troy, New York — Appellant
#76-7181

-against-

BOARD OF EDUCATION, ENLARGED CITY SCHOOL
DISTRICT OF TROY, 1950 Burdett Avenue,
Troy, New York 12180 — Respondent

-and-

THE COMMISSIONER OF EDUCATION
State of New York
University of the State of New York
Washington Avenue
Albany, New York — Respondent

APPEAL

Appellant Pro Se Albert E. McFerran Jr. herein submits his appeal from the Memorandum-Decision and Order issued by Chief Judge James T. Foley, United States District Court, Northern District of New York, at Albany, New York, dated February 26, 1976, said case being number 75-CV-265. The Notice of Appeal was duly filed on March 16, 1976, with attendant fees, and extensions of time for the filing of appellant's brief granted by the Court on May 4, 1976 and on October 28, 1976. Notice of the Index of materials forwarded to the United States Court of Appeals for the Second Circuit from the District Court at Utica, New York re: Civil No. 75-CV-265 was duly received by the herein appellant under the date of April 14, 1976 from said Utica, New York office.

STATEMENT AND HISTORY OF THIS CASE

Appellant is a tenured teacher in the Enlarged City School

District of Troy, New York, having received his legislative (State) tenure in 1966. Commencing with the beginning of the school year 1971-1972, appellant learned that he was not receiving his full statutory credit(NYEL 3101,3102(6) and 3104) for the years of service that he had rendered within the school district, and for those school years for which he had been given credit (transfer credit) when he had been initially employed by the Troy district in 1963 as authorized by EL 3101(2) and (4) cited. By the time the violation of the educational statute was discovered, the matter affected a longevity payment which had become due in 1970. Upon discovery the matter was immediately brought to the attention of the Superintendent of the District who refused to correct the matter, this again commencing in the fall of the school year 1971-1972. Essentially what was in conflict was the salary credit due to a teacher as a result of the continuity of credited service, and this continuity was guaranteed as a matter of law which the school district had actually and illegally interrupted the very year, 1966, in which I had been granted my tenure, an action which required three continuous years of service in the mentioned school district. All attempts to resolvethe matter with the use of attorneys and the teachers organization were futile. The matter was taken to the Commissioner of Education who decided in favor of the school district and in so doing denying me the equality and protection(14th amendment, Res Judicata) of three previous rulings he had made on such longevity payments for teachers and in favor of teachers in the Matters of Ladd, CD #8018, July 1969, Bieber, CD #8201, October 1970, and Boss, CD #8323, August 1971. My Decision, #CD 8608, February 26, 1973, was issued after each of the cited decisions. It is to be noted that the

Commissioner of Education successfully defended his longevity rulings before the New York State Court of Appeals in the Matter of School District v. Nyquist v. Nyquist, 38 NY NY2d 137 (November 25, 1975), but the original appeal in this matter by the appellant--now allegedly CD #8608--remains rejected and the said Commissioner, in another aspect of this matter, refuses to admit his error and has--as will be stated--and has even entered into a conspiracy against the appellant which to this time has cost him two years of an illegal suspension, such suspension placed against him in violation of his due process tenure rights, plus these several months of unwarranted legal expense and legal jeopardy.

Subsequent to the discovery of the improper loss of the continuity of tenure service, appellant then discovered from the school records that in totality he has been underpaid from the commencement of his employment in the Troy School District dating back to 1963, such underpayment involving regular mandated salary schedules, summer school payments, longevity payments and proper step placement, none of which has ever been denied or defended by the school district. With the evolvement of this matter and it actually affecting the guaranteed pension benefits due to public employees under Article 5, Section 7 of the New York State Constitution, such benefits immediately affecting life insurance protection, appellant attempted to resolve this matter through the contract(and State Statute) grievance procedure. From 1973 to 1975, appellant was continually rebuffed by the Board of Education when the teacher attempted to exercise his

First Amendment rights and utilize the grievance procedure. This in turn became more complicated due to the fact that it now developed that the Superintendent had perjured himself when he submitted his Answer to the Commissioner of Education in the matter of CD #8608,(February 26, 1973) and in this crime had been aided and abetted by one Arthur McGinn, president of Thealan Associates, a negotiating firm for school districts, said organization having his main office in Albany New York. It became impossible to utilize the grievance procedure for the obvious reason that the attorny McGinn was not going to admit of his crime and thus jeopardize his business upon the verification that #8606 had been obtained due to the duplicity of the Commissioner of Education and the crimes of said McGinn and the-then Superintendent of Schools. Thus whatever the responsibility of the board in the matter of negligence, this was compounded by the constant stress of McGinn that they "had" this decision of the Commissioner, such position obviously being backed up by the co-conspirator Superintendent.

Still, the appellant did attempt to have the matter resolved, and the teachers organization was of some limited aid in this matter indirectly. As the matter developed, a new superintendent was appointed(the former superintendent retired), but here again the status quo became readily apparent. After several months of attempted use of the grievance procedure, discussion and letters, the new Superintendent, one Sidney Johnson, called me to his office where he verbally abused me and made pretense of assaulting me. This occurred during a summer session in the Troy High School on August 8, 1974, and the activity on the part of Johnson was his attempt to synthesize the total problem and

resolve the matter on his and on the Board's term. In the fall of the year(1974) a grievance was formally filed on this matter and like this appeal, everything possible was done to prevent it from being heard. Finally, Johnson entrapped himself by failing to follow a step in the grievance procedure(contracted) and under the threat by the union that he would be charged with and unfair labor practice if he did not hold a grievance hearing for his conduct of August 8, 1974, he and the Board--represented by an intoxicated McGinn--reluctantly held the hearing on December 4, 1974. McGinn led the charge, little was accomplished but it was stipulated by Johnson would write a letter to me explaining & stating that he had not intended to reprimand me on August 8, 1974. Johnson finally wrote the letter(Exhibit, appendix) which was an insult in its brevity and self-defense. It was written only after he had to be reminded again to conform with the events of the meeting of December 4, 1974 and it took approximately one month to arrive, said letter dated January 3, 1975 as per appendix.

On January 8, 1975, appellant politely and formally requested a meeting with the Superintendent and the high school building principal, this being permitted/(and virtually mandated) under Article III, Grievance, Procedure, of the AGREEMENT BETWEEN THE TTA AND THE SUPERINTENDENT OF SCHOOLS OF THE ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW YORK FOR THE 1974-1975 SCHOOL YEAR, which Johnson himself had signed and agreed to on January 7, 1975, one day prior to the requested and accepted meeting of January 8, 1975 from which an illegal,"indefinite" suspension was to ensue.

As mentioned, a meeting on the problem directly related to Johnson's conduct of August 8, 1974 and his response to the circumstances

surrounding his actions of that date, and his "note " of January 3, 1975, was held on January 8, 1975 in the school building principal's office. As the appellant attempted again attempted to explain his concern for the manner in which he was being treated, and for the form of the response of January 3, 1975, Johnson again became abusive and declared loudly that he was not going to listen to this again. As I attempted to reply Johnson became more enraged, subsequently claiming that I became uncontrolled as I stated(Johnson Report to the Board on January 8, 1975) the following--with Johnson punctuation:

" a. The letter granting him a hearing before the Board Committee was not written by Mr. McLaughlin(Board president); therefore, credibility is questioned."

" b. The letter of January 3, 1975 referred to as a "note". "

" c. He was going to take me to the Commissioner."

" d. You are in this deep."

" e. You and Mr. McGinn are in this together up to here."

" f. You intended to physically attack me in August."

" g. You taught two years and get a salary of $30,000."

" h. You, you----------."

For this the report also stated, " I advised Mr. McFerran that I was suspending him for an indefinite period with pay." Mr. Johnson then added in his report,

"4. I telephoned Attorney Arthur McGinn and reviewed the entire matter with him. He feelings are as follows:

a. We should not rush to reinstate the teacher.

b. Section 913 of the State Education Law might be considered- authorizes a physical examination of the teacher."

We have herein, then, the origin of a hoax from which a teacher,

a tenured teacher, is to receive an "indefinite" suspension from an unauthorized person, together with the formal origin of a consspiracy which is eventually to include not only Mr. McGinn but also the Commissioner of Education and his Counsel, among others in the State Education of New York State, Robert Stone; the hoax will cost the people of the State of New York a sum which can be estimated as between a minimum of $60,000 to $100,000. Actually it is from this time forward that the involvement of the Northern District Court becomes crucial and also abbreviated.

Within his appendix, appellant has included the letter of Sidney Johnson to me, said letter dated January 8, 1975. Fundamentally, it is essentially the only exhibit which must be included since it but verifies the essential violation of the due process rights of the appellant, such rights as codified in EL 3012, 3013 and 3020-a relative to a tenured teacher holding his position, the procedures which must be followed in a challenge to that position, and the protections given by due process under 3020-a of the EL.

PROTECTION OF TENURED TEACHER

NYS Ed. Law, Secs 3012,3013, 3020a

Sections 3112 and 3013(2) Tenure:Union Free and Other School Distric

" (2)...Such persons, and all others employed in teaching... who have served the probationary period as provided in this section , shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing as provided in section three thousand twenty-a of such law:(a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency,physical or mental disability, or neglect of duty. "

3020 Dismissal of teacher:(tenured teacher)

" Except as otherwise provided in sections...three thousand twelve a three thousand thirteen, no teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the commissioner of education shall be held by him sufficient cause for such dismissal."

3020-a Hearing procedures and penalties:

1. Filing of charges. ...all charges against a person enjoying the benefits of tenure as provided in ...section...three thousand twelve, three thousand thirteen...of this law shall be in

writing and

filed with the clerk(of the board,or district)

2. Disposition of charges. Upon receipt of the charges,

the clerk...shall immediately notify the board.

Within five days after the receipt of charges, the employing board, in executive session, shall determine , by a vote of the majority... whether probable cause exists. If such determinatio is affirmative, a written statement... The employee may be suspended pending a hearing on the charges ...

Matter of Peterkin CD 8121, dated March 25,1970, discussing EL 3013(3) as it then existed, and which was repealed into 3020-a on the Hearing Procedures: (3020-a,2,above)

Nyquist:
"The board claims that Education Law 3013(3),(now in part 3020-a(2))does not require that a statement of charges be served simultaneously with the suspension of a teacher. (tenured teacher) Rather, respondent argues that subsequent service of charges relates back and ratified the prior suspensio I do not agree.(Nyquist) Subdivision 3(now 3020-a 2) referred to above, provides, in part, as follows:

> All charges against a person enjoying the benefits of tenure as provided in this section shall be in writing and shall be made to the board of education...The person charged may be suspended by the district superintendent of schools...until the determination of charges(the) by the board of education.

A READING OF THE STATUTE MAKES IT CLEAR THAT A TEACHER(TENURED) MAY NOT BE SUSPENDED UNTIL HE HAS BEEN FORMALLY CHARGED."

If we but now contrast this statement of the law as per the Commissioner of Education in his CD #8121, cited, and then review of letter of Johnson on January 8, 1975, it becomes readily understood as to what actually occurred:

1. Johnson without any authority from the Board suspended me for an "indefinite period"; he suspended me without formal charges; he suspended me without mandated cause being found by the board.
2. Subsequently on January 14, 1975 the board attempted to retroactively legalize the the illegal suspension by citing EL 2508(5), a section of the EL inapplicable to a tenured teacher; also they found cause for no charges whatsoever, nor did they at that time prefer charges, simply continued the "indefinite" suspension without any statutory authority whatsoever.
3. The Board, Johnson, McGinn and Lettko then "approved" a suspension with pay, such suspension but then recently determined by the Court of Appeals in the Matter of Jerry 35 NY 534(decided December 20,1974) which decided that a tenured teacher had to be paid during a period of suspension placed against a teacher under EL 3020-a Hearing Procedures. Essentially what the Board did was to compel me to take a gift through the use of public funds in order to protect themselves in their continual violation of the law. Mr. Nyquist as the Hearing Record confirms joined in the conspiracy, aided and abetted by Stone, Jehu, and Ambach et al, the

Hearing Record of the malicious prosecution which took place against me under 3020-a Hearing Procedures in June 1975 stating from the statment of Lettko, page 361, of the record dated particularlyon June 23, 1975:

> "MR. LETTKO: This is one of the further facts and circumstances that surrounded the event of January 8th,1975(the suspension)and showed Mr. Johnson consulting with the legal staff of the State Education Department on this matter in connection with the action taken." (Quoting EL 2508(5) of the EL against a tenured teacher, rather than granting the guaranteed rights of 3020-a as mandated by law.) (Also,"indefinite" suspension contrary to rights under 3020-a)

In consideration of this total outline and the obvious destruction of my due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, it must also be recognized that both State and Federal(Supreme Court) interpretation of due process procedures violations have been rejected in judicial review, Thus in the Matter of Randall v. Toli 73 Mis 2d 452, the court in referring to Fuentes v. Shevin 407 US 80 and the matter of due process violations states,

> "It appears to this court that the Supreme Court has answered the rationale of section 75 ie.-that the suspension is temporary and if the employee is vindicated, his lost salary will be restored--by stating: "But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This court has not*** embraced the general propostion that a wrong can be done if it can be undone."" (407 U.S. 67,82)

Once the destruction of my due process rights had begun, (McGinn's review of the "entire matter" dating back to 1971, and the conspiracy of the Commissioner of Education was established in protection of CD #8608, February 26, 1973) there came into existence the beginning of some FIVE MONTHS of a period of time before formal charges under 3020-a of the NYSED were placed against the appellant. The procedure therein used by the board and Johnson, aided and abetted by attorney Lettko, but confirms their knowledge of the correct requirements of due process of the law as prescribed by 3020-a and the Matter of Peterkin, CD 8121, cited. We but now outline the chronology of reaching the U.S. Northern District Court in Albany, N.Y . in May of 1975:

1. "Indefinite" illegal suspension placed against the appellant by the Troy Board of Education's Superintendent, such suspension without legal authority, and such action occurring on

   JANUARY 8, 1975

2. Formal Charges placed against the appellant on

   MAY 5, 1975

   this time attempting to follow the formal procedures of EL 3020-a, some five months after the illegal "indefinite" suspension, such action being used in malicious prosecution to coverup actions dating back to 1971.

3. Matter taken to the U.S. District Court, Northern distriict, jurisdiction being assumed by the said district court on

   MAY 28, 1975 (75-CV-265)

   "jurisdiction pursuant to 28 U.S.C.#1343(3) and 42 U.S. C. #1983"(Foley, Memorandum-Decision and Order, dated February 26, 1976,page 2.)

4.Subsequent to, and limited to the jurisdiction admittedly taken in the said Foley Decision, an illegal agreement was extorted from the herein appellant due to the actions of the said Board of Education, its attorneys, and the negligence, incompetency, if not the utter conspiracy the an attorney supposedly representing this appellant. Said alleged agreement was the result of the violation of the due process rights of the appellant commencing on January 8, 1975, the duress placed against the appellant compounding the initial violation of his rights, and the entering into an alleged agreement which is null and void as being against the procedures established under 3020a EL, and against the public policy of the state of New York pertinent to the rights of tenured teachers. Said illegal agreement was coerced upon the appellant on

JULY 11, 1975,

one of the"conditions" of the alleged agreement, paragraph 4 being that,

> "4. Mr. McFerran's civil action entitled Albert E. McFerran Jr. against the Board of Education for the Enlarged City School District of Troy, New York and Ewald Nyquist, Commissioner of Education of the State of New York(Civil Action 75-CV-265) now pending in the United States District Court, Northern District of New York shall be immediately discontinued on the merits and with prejudice, without costs."

Since the appellant had acted Pro Se in the matter, a for stipulation--encluded in the appendix--was duly prepared by the conspirators, the alleged attorney for the appellant falsely attempting on several occasions to induce the appellant to sign the pernicious document. It was never signed, thus-- contrary to the Foley Decision--adding to further imperfections

of the document. In early September, the appellant terminated the services of the conspiring attorney,and on the day scheduled for the hearing of the motion to dismiss the complaint of May 22,1975(received into the jurisdiction of the Court on May 28, 1975, cited), said motion day being September 15,1975, appellant asked for and received additional time to procure the services of another attorney; subsequent extensions were granted on November 3, and December 1, 1975. A New York City attorney was finally obtained in December and further extensions brought the final submission date of papers to February 23,1976, just three days prior to the Memorandum-Decision-Order of February 26, 1976. The defect of the said Decision Order of February 26, 1976 will be based on the following apsects of the case, as will be developed: Statement of Issues

1. The decision is null and void as being without jurisdiction to rule on the alleged agreement.

2. The decision as pertinent to the agreement is in violation of the Public Policy of the state of New York.

3. The decision is in violation of the due process rights of the appellant.

4. The decision is biased, judicially incompetent, if not conspiratal.

5. The decision did not adress itself to the basic issues presented in the complaint.

ARGUMENT: POINT I-LACK OF JURISDICTION

The Foley Decision of February 26, 1976 is null and void pertinent to the alleged agreement of July 11, 1975 and for other issues brought to the Court on May 28, 1975, for lack of jurisdiction as per the 10th amendment of the U.S. Constitution, Article I, Section 10 of the U.S. Constitution, as per conformity with the statements of the agreement itself.

10th Amendment-U.S. Constitution

> "Powers not delegated, reserved to States and people respectively. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Under this amendment thus,

> "Education is purely a matter of state concern and no rights, powers or duties concerning it have been granted to the Federal Government within the limitations of this amendment. State ex rel Steinle v. Fraust 1937 9 N.E. 2d 912,55 Ohio App 37."

From the sequence of the dates given, January 8,1975("indefinite" suspension), May 5, 1975 preferring of formal charges, May 28,1975 assumption by the Federal Court of Jurisdiction, and July 11,1975, the date of the alleged agreement, there was no imposition of jurisidction to the Federal District Court of jurisdiction. Within the Decision-Memorandum is the admission of the limitation of the jurisdiction as per the USC cited,#28(1343,3)and 42(1983) as of May 28, 1975. By the presumption of the court of the alleged legality of the agreement, we have an implicit retroactive application of jurisdiction dating back from July 11(15),1975 to May 28, 1975, something which the court had already estopped itself from doing when it assumed jurisdiction

under the USC sections and date which it cited itself. Additionally, the original complaint did not raise a question as to the constitutionality of the tenure statutes(3012,3013), but rather that his due process rights under the tenure statutes had been violated, plus the questionable consitutionality of EL 3020-a/and the hearing procedures relative to the possible (3) (4) and (5) termination of tenure rights under the statute. Thus,the assumption by the District Court of jurisdiction of an agreement which of its very nature will destroy the tenure statutes and curtail the rights of the appellant and others under the statute by circumventing the tenure statutes and the rights thereunder is in patent violation of the/State of New York and its rights of the legislature, and the appellant herein, to the protection guaranteed under the 10th amendment to the U.S. Constitution reserving to the State its exercise of exclusive control over educational matters, in this/the case sustaining, protection and application of its own laws on the matter of tenure for its public school teachers.

Within the alleged agreement itself is a prohibition against the District's court assuming jurisdiction, a prohibition implicit from the wording of Paragraph #12 of the alleged settlement, such wording duly/of protection by Article I, Section 10 of the U.S. Constitution wherein, "impairing the obligation of contracts" is likewise prohibited.

The alleged agreement as per paragraph #12, written at the command of attorney Lettko: Agreement, p. 6 , July 11,1976.

" 12. The Board and Mr. McFerran hereby agree to submit to the Rensselaer County Supreme Court any dispute which may arise from the interpretation,or relating to the carrying

out of this compromise and settlement agreement or to performances set forth herein; and more particularly any such dispute shall be submitted pursuant to the "New York Simplified Procedure for Court Determination of Disputes" as provided in Civil Practice Law and Rules 3031 thru 3037, and the Board and Mr. McFerran hereby waive a jury trial in any such dispute."

Then:

Lettko affidavit dated September 25, 1975, submitted to the Federal Court Northern District, to show his intent on the jurisdiction of Rensselaer County Court and that he did not want the Federal Court to assume jurisdiction since under the agreement this was not his intention.

"ATTORNEY'S AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS OR DISCONTINUE THE ABOVE ENTITLED ACTION ON THE MERITS" Letto on September 25, 1975, page 4(3) of his "affidavit":

"That plaintiff should not be permitted to assail in this Court the Compromise and Settlement Agreement of July 11, 1975 upon the ground that said Agreement by its express terms in paragraph numbered "12" thereof restricts the plaintiff ALBERT E. MCFERRAN Jr. to seek any relief with respect to any dispute he might have in connection with said agreement, to the Supreme Court of Rensselaer County under the New York Simplified Procedure for Court Determination of Disputes as provided in Civil Practice Law and Rules 3031 through 3037."

We remind the Court that this declaration of intent is a sworn affidavit, sworn to, of course, by Lettko himself.

Lettko continues on in a Second declaration of intent relative to a jurisdiction on the agreement, such jurisdiction to be other than Federal jurisdiction:

DEFENDANT BOARD OF EDUCATION'S MEMORANDUM OF LAW...", December 1, 1975, Paragraph VIII, page 10.(submitted to J. Foley)

"The complaint should be dismissed and discontinued on the merits primarily upon the ground that the plaintiff's acts while represented by counsel and joined in by counsel have legally and equitably divested the Court of jurisdiction of said action by virtue of the Compromise and settlement of July 11, 1975--which took place after the above lawsuit was already pending against both defendants."

(Sequence of Dates: January 8, May 5, May 28, July 11)

Lettko continues on in a Third declaration of intent as to other than Federal jurisdiction on the matter of jurisdiction:

"DEFENDANT BOARD OF EDUCATION'S RESPONDING MEMORANDUM OF LAW..." February 12, 1976, page 14:

> "...the Agreement(Ex "I") expressly provides for recourse to the Supreme Court of Rensselaer County under the Court Simplified Procedure for Determination of Disputes..."

Conclusion: Point I Lack of Jurisdiction

It is readily apparent that the Federal District Court erred in assuming jurisdiction on the matter of this agreement and the interpretation of said agreement. Under the 10th amendment of the U.S. Constitution, education is the exclusive domain of the individual states. No issue was brought to the District Court challenging such domain. The alleged agreement within its own paragraph #12, supplemented by the sworn and quoted statements of the attorney for the respondent school board expressly verifies nonfederal jurisdiction. The court in assuming a jurisdiction in conflict with Article I, Section 10 of the U.S. Constitution, as well as a decision in conflict with the 10th amendment, cited, has rendered a decision which is null and void and estoppes the respondents from any further petition as to legality from their own knowingly false election of remedies.

POINT II--AGREEMENT IS CONTRARY TO THE ANNOUNCED PUBLIC POLICY OF THE STATE OF NEW YORK

As developed, the tenure statutes of the State of New York are basically expressed in EL 3012 and 3013 together with EL 3020-a which establishes the Hearing Procedures under which the continuity of tenure service may be either terminated or suspended. In the matter before this court, the appellant, a tenured teacher,was denied the due process rights guaranteed to him under the 5th and 14th

amendments(codified in this instance as per the procedures of EL 3020-a, 1 and 2) was suspended "indefinitely" without prior or post hearing, harassed, intimidated, terrorized and attempted to be entrapped until finally an "agreement" was coerced from him which was to be the coverup procedure engaged in by the Board and its designated officials to protect themselves against their described actions, their criminal conspiracy, their extortion and their blackmail. From all of this they were desirous of "releases" and to get the same they would make their own law, illegally interrupt the continuity of the legislative tenure of the appellant, and then establish--contrary to law--the terms under which the legislative tenure of the appellant would be reestablished-secretly.

Again in this instant matter, this Board of Education and the Commissioner of Education attempted to circumvent the employment rights of the appellant by interrupting his continued tenure rights by an alleged private agreement which was forced upon upon/him otherwise he would have lost his tenure altogether, since it is apparent from the record of the respondents and a Hearing Record saturated with their perjury, fraud, false witnessing and fraud that they would conclude this matter on their terms, the terms being specified in the illegal private agreement. J. Foley, contrary to State EL,even introduced the priority of "waiver" into the agreement, premising his remarks on the "established principles of contract law" such a position obviated, in this instance, by the public policy of the State of New York to which he must give credence under the full faith and credit sections of the U.S. Constitution, Atricle 4,Sec 1.

Foley, page 3 of his Memorandum-Decision:

> "The basic determination for this Court is to evaluate the fundamental validity of the settlement agreement with this guide:
> (i.)n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing(quote Alexander v. Gardner-Denver 415 US35,67 n.15'7

The Matter of Boyd v. Collins 11 NY 2d 228(1962,)the basic New York on the protection of teacher tenure rights at page 233 (and specifically contrary to private agreements usurping tenure protection) states,

> "To validate such a holding of waiver would be contrary to the strong public policy of this State expressed in the tenure statutes. The purpose of the tenure law is to give security to competent members of the educational system in the positions to which they have been appointed. ...For the courts to validate a "waiver"(see illustratively, as to public policy CSL#96) by a teacher of such rights woul be violative of the spirit and public purpose of the act which protects the school system by giving permanency to the jobs of experienced teachers. This school board in order to back out of an unpleasant situtation tried to create its own public policy by destroying tenure rights.

Again, the Commissioner of Education has verified this position and confirmed it in his RESPONDENT COMMISSIONER BRIEF, submitted to the Court of Appeals of this state, such Brief(1974-5 apparently successful in convincing the court of the legality of continued and successive longevity payments as per 3102(6) of the EL in what is now known as the Matter of School District v. Nyquist, 38 NY 2d 137(November 26, 1975) wherein on page 18, the following is stated in such Brief:

> " Consequently, in Matter of Boyd v. Collins 11 NY 2d 228, an agreement waiving the benefits of the tenure law)(in the case of the appellant. the continuity of his employment service) was held invalide on public policy grounds. Similarly, agreements which provided for less salary during summer months than was required by statut(citations) were held to be illegal as violative of ..public policy. law &

Within the School District v. Nyquist decision itself further reinforcement of the invalidity of agreements contrary to statute: (at page 143)

> "Third, and finally, we conclude that the provisions of the ...agreement between the parties, however explicit or clear their content may be, cannot operate to supercede the imperative provisions of the Education Law. "

Then, "Waiver by a teacher of his tenure rights would be contrary to public policy." Application of Bear v. Nyquist 336 NYS2d 476.

"The Board of Education has no power to make contracts with its employees which are not authorized by Statute.(matter of Boyd v. Collins 11 NY 2d 228)",,Matter of Downey v. Lackawanna School District, 51 AD 2d at 179, February 1976.

"Parties in voluntary agreement are not limited, EXCEPT IN RARE MATTERS CONTRARY TO PUBLIC POLICY, from agreeing to anything they wish." Mount St. Mary's Hosp. v. Catherwood 26 NY 2d 493.

The actions of this Board and its confederates are not only contrary to the announced statutory laws of this state, pertinent to tenure specficially, but are also contrary to the specifics of the PERL, commonly known as the Taylor Law, and the matter therein pertinent to the rights and procedures for the settling of employee disputes. This also affects public policy. (Matter of Teachers of Huntington, 30 NY 2d 122, at page 131.)

> "It is of more than passing significant that the Taylor Law explicitly vests employee organizations with the right to represent public employees not only in connection with negotiations as to the terms and conditions of employment but also as to the "administration of grievances arising thereunder." Indeed, is is the declared policy of this state to encourage "public employers and ****employee organizations to agree upon procedures for resolving disputes."

The initial illegal suspension, and the then subsequent transfer of the grievance matter into one coming allegedly under EL 913 was and is but additional fraud and violation of the

due process and tenure rights of the appellant. Within the Troy system there is a contracted grievance procedure as well as an arbitration procedure with the contract. By the fraudulent transferrance of this matter to #EL 913, by subterfuge and delay this means of resolution of the matter has been denied.

Summarily, an alleged agreement coerced from the appellant wherein appellant is to have one of the "benefits of tenure" (3012, 3013EL)---the continuity of his employment interrupted--abridged is contrary to the public policy of this state. The right of employment--"...it is well established that a tenured teacher has a constitutionally protected interest- even a property interest- in his right to employment and compensation therefor..."(Matter of Harris v. Dist. 86 Misc 2d 144)

"Teacher's interest in continued employment was property interest within the protection of procedural due process guarantees.." (Kinsella v. Brd of Ed)

"Teaured teacher has rights in continued employment were ~~were~~ safeguarded by procedural due process, and could not be extinguished except upon cause following opportunity for hearing." (Bevan v. NYSRS 44 AD 2d 163, 355 NYS 2d 185)

"Tenured teacher has a constitutionally protected interest in his right to employment" Jerry v. Brd of Ed. 75 Misc 461, 347 NYS2d 917.

CONCLUSION ON POINT II

Respondents attempted to enter into a private agreement in order to interrupt the continuity of his employment service, such employment service as that of a tenured teacher in NYS. Such action is illegal as being against the public policy of this state as mandated in the tenure statutes and its procedures relative to the termination or the suspension of such services.

Such statutes have been sustained in the Matter of Boyd C/A decision cited directly in reference to the tenure matter, and supplemented by the ruling of the same Court of Appeals in the Matter of the Huntington Teachers, cited, pertinent to the matter of negotiated grievance procedures relative to the matter of the settlement of disputes by collective, GROUP negotiations. Although such a means was available to this Troy Board, they refused to activate it as discussed. The rulings of the State Court must be given full faith and credit (Article 4, Section 1, as well as the exclusiveness of the decisions on Educational Matters as per the 10th amendment to the U.S. Constitution.) The agreement within the state, as shown, is null and void and must so be considered in the Federal jurisdiction.

POINT III--Decision is in VIOLATION OF DUE PROCESS

NYS Education Law Section 3020-a(4) stipulates the due process process procedures subsequent to 3020-a,

(1) Filing of charges: "...writing...filing...period..."

(2) Disposition of Charges(as outlined)

"notify the board..."

"board---determine...probable cause...written state."

"employee may be suspended"

"notify: employee
Commissioner of Ed.
(possible) waiver.

(3) Hearings: (a) notice (b) panel (c) procedures

(4) Post-hearing Procedures

Commissioner of Ed.--report + to employee and C/B.
(time limit)

Board Determination: (time limit) fix penalty or punishment, if any
(reprimand
fine
suspension for a fixed time w/o pay
dismissal

It is to be noted, that there is no provision for for a private agreement by a board and the person so placed on charges. The reason is apparent from the Matter of Boyd, determined by the Court of Appeals in 1962; page 234

"The charges should either have been dropped or tried out pursuant to statute."

Indeed the charges were dropped, but to protect itself the Board then attempted to enter into an illicit and illegal agreement giving them the right to alter the terms of the legislative tenure and to continue the interruption of the employment of the appellant begun on January 8, 1975 with the "indefinite" suspension of Johnson without cause. (Notice that even in punishment, if levied, the suspension must be for a "fixed" term. 3020A EL,(4), above.) As per Boyd at 234,

"This school board in order to back out of an unpleasant situtation tried to create its own public policy by destroying tenure rights and giving away public money."

Boyd at 233,

The statutory tenure terms can be changed by the legislature but never by a Board ofEducation...If all of this can be nullified'by a Board of Education)..with or without pay... the protection of teachers has been removed."

New York Court ofAppeals, People v. Mackell, June 10, 1976,Opinion #310, page 5

"Absent a constitutional question, even the State's highest court may not refuse...to apply the plain import of an applicable statute, which until and unless amended or repealed must be respected as the law for all our people no matter where positioned."

"In short, the board's procedural due process was defective to the extent that the result amounted to a deprivation of

substantive due process."Matter of Harris" 86 Misc 144,3/76. On the matter of specific authority needed to terminate charges and then procure such an alleged agreement as we have here, a paraphrase of the Matter of Jerry 35 NY 2d 534, as 543 states,

> "There being no constitutional impediment, in the view of all of us, to a statutory grant of explicit authority... we leave it to legislative determination, if the Legislature is so minded, to grant specifically defined authority..."

Substantially, the procedures designated as "Post Hearing Procedures,"3020-a(4) are "imperative provisions of the Education Law, specifically in this instance,"(School District v. Nyquist, 38 NY 2d at p. 143, which are absent the "explicit authority"(Jerry, above), needed to establish the credibility need to endorse such an agreement as we have herein challenged.

CONCLUSION: POINT THREE

The Post Hearing Procedures, 3020-a(4) are specific as to the available opitions available to a school board after the hearing record has been forwared to it by the Commissioner of Education. To now add an agreement to the options, even without proper conclusion of the Hearing itself, is without specific statutory authority. If the charges are dropped,it must be presumed that such action was taken due to their initial falsity or due to the fact that they cannot be sustained. Once dropped, there is no statutory authority for agreements, or other protective devices for the action so taken by the board.

POINT 4 DECISION IS BIASED AND INCOMPETENT

1. Cited within this brief have been three instances wherein even Lettko informed the Court that his intent in the coerced agreement was to have jursidiction in the Rensselaer County Court. In one stance, Lettko even swore to this matter. Foley ignored this and in violation of Article I, Sec 10 of U.S. Constitution, and the 10th amendment to the Constitution assumed false jurisdiction and rendered a decision which is null and void.

2. Foley misread and misinterpreted the Matter of Boyd, cited, the basic NYEL case, confirmed in the Record on Appeal of the Commissioner of Education himself, cited, on private agreements contrary to existing statutory law.

3. Foley ignored two sworn statements submitted by the appellant to the court on November 3, 1975, statements sworn to on November 1, 1975, which outlined the perjury, fraud, and malicious prosecution placed against the appellant by the school district and its officials, as indentified in this matter.

4. Foley ignored the information given in oral argument on December 1, 1975 which confirmed the basic complaint and sworn statments of November 1, 1975.

5. Foley ignored the contents of a letter of December 31, 1975 which again outlined the basic problem of the violation of EL, longevity payments etc.

6. Foley scornfully referred to materials submitted to him by appellant in February, 1976, in his Memorandum-Decision p. 3 as "his most recent voluminous affidavit", and then gave evidence that he was totally unfamiliar with such "voluminous affidavit."

7. Foley within his decision has used the EL sections 3020 and 3020-a interchangeably when in fact they are not so creditable. 3020 is relative to the Dismissal of a tenured teacher; 3020-a is pertinent to the Hearing procedures under which a teacher may be dismissed. In any instance, appellant fails to find one mention in the original complaint of May 22, 1975 of the mention of Section 3020. This is judicial incompetency and illiteracy.

8. Foley admits that while the "voluminous affidavit" was filed by the appellant on February 23, 1976 that he gave a very hurried and I submit incompetent reading of such affidavit(and related papers) to have such a monstrous decision as we have herein completed by February 26, 1976.

9. Foley contradicts himself on jurisdictional matters, stating the date for the assumption of jurisdiction as May 28, 1975, and then allowing a subsequent agreement,

that dated as July 11, 1975 to be incorporated in the jurisdiction retroactively; this in spite of his awareness of dates of other papers showing the impossibility of such action on his part.

10. Foley lists that his decision will be based on the "established principles of contract law," p. 3, whereas the public policy of the state and the illegality of the agreement itself rejects such an assertion.

11. Foley mentions the status of my alleged counsel whom Foley describes as "competent to my knowledge." This, it is submitted is improper judicial comment, analogous to the endorsement of said attorney's procedures in the practice of law. J. Foley gives no substantiation of his statement but from the record to this Appellate Court, it is possible to conclude that since J. Foley is willing to violate the public policy of the State of New York, that since he will attempt to legalize an illegal agreement, that he in turn will reciprocate and allow such an attorney to permit his client to sign an agreement which will culminate in such a legal monstrosity. Perhaps we should remind J. Foley of the follwing acts of the attorney which show him to be "competent":

1. Neglecting to review the record of the case with the appellant when appellant brought the matter to said attorney.
2. Admitting to the appellant--this is the attorney--that the entire matter was related to the missed longevity payment and nothing more.
3. That the herein appellant was but an interval between later clients and that his contact with other attorneys in this respect was important to him.
4. Allowing the appellant to sign an illegal agreement.
5. Harassing the appellant to sign a stipulation to release the conspirators Lettko, McGinn, Johnson, the Commissioner of Education and the Counsel to the Commissioner, Stone, and the several members of the Board of Education in Troy.
6. Stating that if the Courts OK'd Longevity payments I'd be paid

Perhaps what J. Foley really knew of the "competency" of this attorney was related to other activites of J.Foley. The record of the court discloses that it was necessary for him to sentence the father of this attorney, also an attorney, for some form of tax evasion. Foley was very understanding of this matter and undoubtedly said attorney had contact with Foley on it.

12. Foley mentions "involuntariness" as being essential to the voiding of the agreement; as now seen, it is involuntary as a matter of law.

13. Foley mentions the "considerations" given under the agreement. As per Boyd, they were involuntary gifts of public money and essentially misappropriations of public funds carried on for purposes of extortion and blackmail. Foley is now involved in such crime through his contributory negligence.

14. Foley proclaims that, "The agreement rather than stripping plaintiff of tenure not only guarantees his tenure, but also his teaching position..." p. 6.

Perhaps J. Foley has heard of the New York State Legislature. This is the body which has guaranteed the tenure, not any private agreement designed to protect its originators from crime.

15. We but ask the court to match one of the final statements of J. Foley with what has been developed pertient to the tenure statutes, the Taylor Law, the 10th amendment to the U.S. Constitution, and Articles 1(10), and Article 4(1), of said Constitution:

Foley, page 7:

"The agreement here was a fair and sensible effort to terminate the numerous proceedings in which the plaintiff and the defendants were engaged, in this court, the Courts of New York State, and primarily before the Board of Education."

How much more"fair and sensible" can one become than to,

1. Destroy the Constitution of the United States in its designated aspects.
2. Destroy the tenure statutes, and Taylor Law of NYS
3. Destroy valid contracts.
4. Destroy due faith and credit among the several states.
5. Destroy the 1st, fifth and 14th amendments of the Constitution.
6. Destroy Article 5, Section 7 of the NYS Constitution relative to pension protection for public employees.
7. Destroy the 10th amendment to the U.S. Constitution.

To all of this we conclude with another sworn statement from Mr. George Lettko, attorney for the respondent school board, now aided and abetted in his crime by the Attorney General of the State of New York and the Commissioner of Education--rather the office of the Commissioner--to wit we have the following statement(s) on the matter of the Memorandum-Decision-Order of Foley, Feb. 26, 1976.

1. DEFENDANT-BOARD ATTORNEY'S AFFIRMATION REPLYING TO PLAINTIFF'S AFFIDAVIT.... Affirmed by George S. Lettko, May 17, 1976:

"10. I respectfully submit my opinion that Judge Foley's Decision upholds the settlement agreement of July 11, 1975 in its entirety." (mine)

2. AFFIDAVIT OF SIDNEY L. JOHNSON(prepared by Lettko) and witnessed by Lettko on May 4, 1976: p. 6

" ...the United States District Court, Northern District--which upheld the settlement agreement of July 11, 1975 in entirety...(mine)

3. AFFIDAVIT OF DEFENDANT BOARD OF EDUCATION'S ATTORNEY... May, 4, 1976 p.4

"The compromise-settlement agreement of July 11, 1975(Exhibit I) has been upheld in its entirety by the United States District Court..."

4. AFFIDAVIT OF SIDNEY JOHNSON, SUPERINTENDENT, SWORN TO ON 30 July 1976, statement prepared and witnessed by Lettko,

"...the compromise and settlement agreement of July 11, 1975, ...which Judge Foley upheld in its entirety..."

If we but contrast these perjuries with the Foley Decision, we immediately are aware that Judge Foley stated himself, page 2

"IT MUST BE EMPHASIZED THAT THIS DECISION WILL BE PRIMARILY CONCERNED WITH THE ENFORCEMENT OF THE AGREEMENT DISCONTINUING THIS INSTANT LITIGATION. " Notice that "entirety" is unknown to even the Foley vocabulary.

In the alleged Compromise and Settlement Agreement,"this instant ligitation" is applicable to Paragraph 4, only. Once again J. Foley contradicts himself since he ranged over many of the invalid sections of the alleged agreement, although he was limited to 4, literally. Then, too, if he did approve the alleged agreement in its entirety, he would have to return the matter to the Rensselaer County Court as per paragraph#12 relative to jurisdiction as he was so many times told by Lettko. This would be in compliance with Article 1, Section 10 of the U.S. Constitution; however, the next

question would be, as from Boyd, cited, "Where would he get such power?" since under the 10th amendment he has not jurisdiction in the first instance.

CONCLUSION ON POINT #4

The Foley Memorandum-Decision of February 26, 1976 is a hoax and a fraud upon the people of the U.S. and American jurisprudence. It is biased, illiterate and the product of judicial incompetence. True, there is the matter of the perjuries of Johnson, Lettko and others, but Foley was duly warned and implicitly he joined in the assault on my civil liberties. We but draw the attention of the court to one final example of the utter incompetence with which I have been faced and ask the court to now reconcile it with the facts of the matter as presented:

Foley at page 5 of his Memorandum-Decision:

> "Pursuant to the New York Education Law, Section 3020(a), a hearing was commenced before an impartial hearing officer on June 11, 1975, and continued on several occasions, June 19, June 23 and July 11, 1975, in order that plaintiff could obtain the services of a lawyer."

This is judicial murder.

POINT 5: ISSUES OF COMPLAINT OF MAY 22,1975 NEITHER FACED NOR DECIDED.

As is evident from the Foley Memorandum-Decision of February 26, 1976, the basic issues brought to the Court in the intial May Complaint were not resolved or faced by the court, and the Complaint was dismissed "pursuant to the terms of the Agreement that agreeed to its discontinuance. " Additionally, based on the alleged agreement, "The plaintiff's request for the convening of a three-judge court is denied along with the dismissal of the complaint", obviously also based on the allged "agreement."

The denial of the request for the convening of a three-judge court is apparently in reference to the alleged claim, page 2 of the Memorandum Decision, that "Section 3020 of the New York Education Law is unconstitutional," something which the complaint does not even verify, since complaint mentions 3020-a, as has been explained. In speaking of the Federal, constitutional issues, the Court admits that it will not decide on them, page 5, "Since other federal courts have passed on issues similiar(my emphasis) to those that the plaintiff raises, I believe, that it would be appropriate to make some brief comments on these decisions without purporting to render a decision on the merits of this litigation."

Thus, it appears that with the sustaining of the agreement, now known to be without the jurisdiction of this Court, and illegal within the State in which it was attempted to be made as being against its public policy, the basic issues brought to the Court were not even considered. The basic issues are able to be structured in precis from page 11 of the May complaint. Fundamentally, what was petitioned for was, (and a requested decision thereon)

Recognition of,

1. the violation of due process protection due to the appellant, such due process as outlined in 3020-a, (1) and (2) as developed, contrary to the actual placing of an "indefinite" suspension by an unauthorized person, later attempted to be retroactively sanctioned by a conspiring boarddof education and designated officials.

and,

2. a determination relative to the procedures of 3020-a (3)4,5 which to the best knowledge of the herein appellant were unconstitutional and had not been tried out by "other Federal Courts", said issues in turn which were not even "similiar" to those other Federal Courts.

plus,

3. certain injunctive relief was also asked for, as well as costs for the court action et al which had been so illegally and wantonly placed agaist the appellant.

Relief asked from the Court of Appeals

Second Circuit, U.S. Court

1. A reversal of the Memorandum-Order-Decision of J. Foley dated February 26, 1976, declaring such Decision-Order to be null and void as being without jurisdiction:

   A. Such reversal based on paragraph #12 of the alleged agreement dated July 11, 1975, such declaration of intention verified by the affidavit and sundry, excerpted statements of the attorney for the respondent school district, Geroge Lettko, such statements, as quoted, dated respectively September 25, 1975 (sworn affidavit), December 1, 1975 and February 12, 1976.

   B. Such reversal based also as a matter of Constitutional law, the 10th amendment to the U.S. Constitution, jurisdiction therefrom in educational matters being a primary matter of state concern under the reserved powers clause.

   C. Such reversal based also on Article 4, Section 1 of the U.S. Constitution, giving full faith and credit to the laws of New York State in the following matters:

      1. tenure statutes EL 3012, 3013 and 3020-a (1) and (2)
      2. PERL, the Taylor Law, and its primary as to the matters of grievance settlement by way of collective negotiations, not individual "contracts," which actually void the tenure statutes and the PERL.

2. Declare that both the Respondent School District and the Commissioner of Education are both equitably and collaterally estopped from a further defense in this matter by reason of,

   A. laches--deliberate harm being done to appellant through their obstruction of justice, through delays which are illegal and unwarranted.

   B. election of remedies: that as evidenced, Lettko and the school district and the Commissioner of education, knew that the Federal Court had no jurisdiction in this matter, but subsequent to the decision-after pleading to the contrary--they accepted this unjust determination in its "entirety", again knowing

that said "decision" was a nullity, yet they themselves accepting it as a valid decision and communicating its "validity" as such.

C then grant relief as per petition of May 22,1975,p.11

3. If the Court cannot render decision according to (2),above, as submitted, it is requested that it declare the decision a nullity as being without jurisdiction in respect to the agreement, as indicated in (1), above, and then remand the matter back to the Federal District Court for a hearing on the basic issues originally submitted to such court, but never heard by such Court. It is requested that such hearing--since it is involved with vital constitutional question--be heard by the requested three-judge court, and if not by the three judge Court, then that a new judge be designated for the hearing of the issues as outlined.

VERIFICATION

STATE OF NEW YORK

COUNTY OF ALBANY

Albert E. McFerran Jr. being duly sworn deposes and says that he is the appellant in this proceeding; that he has read the annexed Appeal and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief; and as to those matters he believes to be true.

Albert E. McFerran Jr.

Subscribed and sworn to before me this 18th of November 1976.

Michelle M. McCasland

MICHELLE M. McCASLAND
Notary Public, State of New York
Qualified in Saratoga County
My Commission Expires March 30, 1977